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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 855

HARLAN BLACKBURN,

Petitioner,

vs.

NATHAN MAYO, as Custodian of the State Prison, State of Florida,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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This Reply Brief will examine some of the arguments adduced by the Respondent in his "Brief In Opposition to Granting Writ of Certiorari." In the course of the reply, that Brief will be denominated "RB." As in the original petition, references to the transcript of the trial proceedings will be denominated "TR", and references to the Record in the United States Court of Appeals for the Fifth Circuit, will be denominated "R".

It should be clarified at the outset that Respondent's efforts to categorize the charging document (Question one of the original Petition for Writ of Certiorari) as being within the framework of the legal questions presented repeatedly before the Supreme Court of Florida, in the cases cited at "RB" page eight, are illusory. Petitioner has never contended that the alternative provisions of the Florida Lottery Statute (Section 849.09, Florida Statutes 1957) are violative of due process or that an indictment based thereon is similarly faulty. Nor has Petitioner ever complained that those jointly charged with him, through their joinder, created a violation of the Fourteenth Amendment. Rather, Petitioner asserts that the fundamental constitutional violation goes to the issue of misjoined defendants and, pari passu, the offenses these defendants committed. It is not the prolixity or inartfulness nor the multi-count facets of the indictment that raised the issues which this Court should resolve. It is the fact that other defendants are charged in this document who have committed, so far as the document itself reveals, a crime different from that with which Petitioner was charged. This misjoinder is the crux of the first question of the Petition for Writ of Certiorari.

Nor does any "fair interpretation" of the charging instrument as a whole demonstrate any connection between the misjoined defendants and Petitioner (RB 8). As an examination of the several counts (App. 15 of Petition) reveals, individuals were charged with Petitioner who allegedly committed distinct and separate crimes in two counties and four counties, whereas Petitioner was charged with a different crime that had a nexus in five counties. There is, it is true, a necessary similarity in phraseology used in identifying the offenses charged, but

the information per se establishes no connection between the misjoined defendants and Petitioner. There is no allegation of conspiracy or concert of action, nor involvement of each with the crimes of the other in any way. Essentially, Respondent seems not to grasp the real question here presented. The question here is not whether several people who have engaged in the several facets of the operation of a lottery may be jointly charged and tried for such offense. The question here is whether it is a denial of due process of law under the United States Constitution for a state to charge and bring to a single trial several different defendants upon separate, unrelated and distinct charges in the various counts of a criminal information. Subsidiary to this question is the further question of whether, when defendants separately charged with separate and distinct offenses in the various counts of a criminal information are later tried in a state court jointly as principals in the commission of a single offense (operation of a huge lottery allegedly permeating much of central Florida), there is such a fatal variance between the charge and the proof as to amount to a denial of due process of law under the Constitution of the United States.

Petitioner's claim as a result of being forced to trial under the charging instrument here involved is not simply that "guilt spilled over on him" (RB 9). The various factors that contributed to the Petitioner's prejudice are alluded to on page 10 of the Petition. As to the argument that the "brains" of the lottery could hardly be prejudiced by being tried with his hired help (RB 9), the simple answer is that the trial of multi-defendants in the context that existed at the trial of Petitioner resulted in a reciprocal inter-reaction that affected all so far as the psychological implications of rub-off guilt are concerned.

Petitioner has asserted that the standards used by the Fifth Circuit in demanding proof of active prejudice and reasoning as it did constituted an erroneous departure from procedural due process of law. Petitioner does not believe that established controlling principles enunciated in the cases cited at page 9 of the Reply Brief would in any sense be subverted by a reversal of the judgment of the Fifth Circuit. Contrariwise, these principles would be vitalized anew. The question before this Court, if the Petition is granted, will be whether the standard of due process in the Fourteenth Amendment as enunciated in the cases on page 9 of the Reply Brief and throughout the history of the application of the due process concept, vitiates Petitioner's conviction. Petitioner urges not merely that due process is violated by a charging document and subsequent joint trial thereon such as obtained in this case, but also that examination of the problem affords this Court an opportunity to explore in a meaningful way the implications of due process (See Petition p. 9) and to correct what appears to be an overly rigid standard of adjudication that has arisen in this area (Petition p. 12). Procedurally in every aspect this case is ripe for adjudication by this Court and an appropriate factual configuration is present. Appropriate objections were urged throughout. This Court should decide the question.

A trial in an area infected with adverse opinion which permeates the thinking of substantially all the populace can render nugatory any concept of fairness. This is an important question and this case presents suitable facts for consideration of the issue.

Ninety-seven articles of an emotional nature were printed over a two-year period condemning Petitioner's conduct in one aspect or another and branding him a criminal. Respondent asserts that one year elapsed between the date of publication of most of these articles and the time of the trial (RB 9-10). In fact, the newspaper deluge commenced again as the trial was about to begin and almost one-third of the total of the articles were published immediately prior to the trial. The effect of these front-page headline accounts was to reinstate the whole sequence of the other articles that had appeared. Included in this new series was the heinous accusation that Petitioner had brought about a man's assassination. Surely the total effect of this re-awakened and re-enforced onslaught was to deny a fair trial.

The Respondent raises what appears to be a quasi-estoppel argument, asserting that Petitioner brought about some of the publicity himself by fleeing the jurisdiction. Whatever the catalyst of the publicity, it is the fact that it existed and not its causal source that is important. As the Respondent knows, Petitioner left Florida and resisted extradition because of his physical fear of the incarcerating authority, the Sheriff of Polk County, Florida. When this Sheriff was defeated in his campaign for election, the Petitioner voluntarily surrendered; moreover, Petitioner had offered to surrender to any Sheriff but the then Polk County Sheriff, an offer which was refused. In this connection it should be mentioned that the sophistry (RB 11) that because the candidate for Sheriff with whom Petitioner was friendly was elected, Petitioner could not have been ill-regarded by the citizenry of Polk County, is meaningless. The multi-faceted circumstances of the election are not before this Court. The ver-

ified venue motion, non-traversed by the Respondent, is (TR p. 167-168). This motion related that Petitioner, or the charges against him, had been made a political football in the race for Sheriff of Polk County, and this factor can hardly be questioned.

Similarly, Petitioner in the verified venue motion, non-traversed as to this fact also by the Respondent, was asserted to have been depicted as a criminal preying on the working people of Polk County in the operation of one of the most diabolical gangs infesting society (Petition 6). The name of the gang, the Mafia, may not appear in the Record (See RB 12), but this fact was included for its informational value and certainly every one at the trial stage, at least, was aware of the label.

The Respondent has chosen in his legal argument on the publicity question (RB 10), the polemical technique of contrasting cases which were reversed because of adverse publicity surrounding the trial with the facts of the instant case. Petitioner does not believe that the limits of the adverse publicity thesis, insofar as that thesis relates to denial of a fair trial, are marked by the mob domination cases such as *Shepherd v. Florida* or the extraordinary circumstances of the *Juelick* case where each juror had sworn that he had an opinion that the defendant was guilty prior to the trial. Surely less sensational but nevertheless prejudicial factors create a situation where a fair trial cannot be held. Once again, Petitioner urges that if the Petition for Writ of Certiorari is granted, the facts of this case are such that a reversal should ensue because of the denial. Of primary concern, however, at this stage of the proceedings is that this case presents an appropriate congeries of circumstances for this Court to consider the im-

portant question of whether a fair trial was denied Petitioner because of a failure to grant change of venue. Procedurally, (see Petition 13-14) and otherwise, the case is ripe for adjudication and within its framework appropriate guides for the jurisprudence of the future can be formulated.

CONCLUSION

For the foregoing reasons and on the basis of the factors adduced in the Petition for Writ of Certiorari, the Writ should be granted in this case.

Respectfully submitted,

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PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Reply to Respondent's Brief in Opposition to Granting Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 15 day of April, 1958, to Richard W. Erwin, Attorney-General of the State of Florida, Attorney for Respondent, at his offices in Tallahassee, Florida.

Claude Pepper

CLAUDE PEPPER